

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

## MOTION INFORMATION STATEMENT

Docket Number(s): 14-3872-cr

Caption [use short title]

Motion for: permission to file a supplemental brief.

Set forth below precise, complete statement of relief sought:

US v. HILL

permission to file a supplemental brief on behalf of appellant Elvin Hill.

MOVING PARTY: ELVIN HILL

☐ Plaintiff☒ Defendant☐ Appellant/Petitioner☐ Appellee/Respondent

OPPOSING PARTY: UNITED STATES OF AMERICA

MOVING ATTORNEY: YUANCHUNG LEE

OPPOSING ATTORNEY: DANIEL SILVER, ESQ.

[name of attorney, with firm, address, phone number and e-mail]

Federal Defenders of New York, Inc., Appeals Bureau

Assistant United States Attorney, Eastern District of New York

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Brooklyn, New York 11201

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(212) 637-6034

Court-Judge/Agency appealed from: MATSUMOTO, J., U.S.D.J./E.D.N.Y.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):



Yes



No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND  
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?



Yes



No

Has this relief been previously sought in this Court?



Yes



No

Requested return date and explanation of emergency:

Opposing counsel's position on motion:



Unopposed



Opposed



Don't Know

Does opposing counsel intend to file a response:



Yes



No



Don't Know

Is oral argument on motion requested?



Yes



No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?



Yes



No

If yes, enter date:

Signature of Moving Attorney:

Date: 11/10/15

Service by: ☒ CM/ECF☐ Other [Attach proof of service]

## ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: \_\_\_\_\_

By: \_\_\_\_\_

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA : DECLARATION

- v - : Docket No. 14-3872-cr

ELVIN HILL, :

Appellant. :

-----X

**YUANCHUNG LEE** declares under penalty of perjury, pursuant to  
28 U.S.C. § 1746, as follows:

1. I am an attorney with the Federal Defenders of New York, Inc., Appeals Bureau, counsel to appellant Elvin Hill. I make this declaration in support of a motion for leave to file a supplemental brief -- which I am filing herewith -- in light of the Supreme Court's decision in Johnson v. United States, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551 (June 26, 2015). The Government does not oppose this motion, but requests an opportunity to respond to the arguments raised in the supplemental brief if the Court grants the motion.

2. Elvin Hill appeals from a final judgment of conviction entered on October 6, 2014, convicting him of violating 18 U.S.C. § 924(j)(1) (killing someone during a violation of § 924(c)(1)) and sentencing him to 43 years of imprisonment.

3. Mr. Hill filed a brief with this Court on March 20, 2015. The Government filed an appellee's brief on June 18, 2015. Appellant's reply brief was filed on July 1, 2015.

4. Oral argument is scheduled for this Thursday, November

12, 2015, before a Panel consisting of Judges Jacobs, Livingston, and Droney.

5. On June 26, 2015, the Supreme Court rendered its decision in Johnson, a case involving the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Johnson ruled that the residual clause of § 924(e)(2)(B)(ii), which defined a "violent felony" as a felony offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague and therefore void under the Due Process Clause.

6. Mr. Hill's case does not involve § 924(e). Therefore, undersigned counsel did not recognize Johnson's relevance to this appeal when, five days after Johnson was issued, he submitted the reply brief in this case.

7. Counsel only recently realized that Johnson's invalidation of the ACCA's residual clause affects Mr. Hill's case. As explained in Point I of the attached supplemental brief, Johnson logically requires the invalidation of the materially indistinguishable "residual clause" of § 924(c)(3)(B), defining a "crime of violence" as a felony offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

8. If § 924(c)(3)(B) is void for vagueness, then Mr. Hill's

conviction can stand only if the Hobbs Act robbery (in violation of § 1951(a)) underlying his conviction qualifies as a crime of violence under the other prong of § 924(c)(3), specifically the "force clause" of § 924(c)(3)(A), which defines a "crime of violence" as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

9. As argued in Point II of the supplemental brief, Hobbs Act robbery does not qualify, under the required categorical approach, as a crime of violence under the force clause of § 924(c)(3)(A). This is so because Hobbs Act robbery does not necessarily require "violent" "physical force," or the intentional availment of the same.

10. The defendant's commission of a "crime of violence" within the meaning of § 924(c)(3) is an essential element of the offense of conviction. Because this element cannot be satisfied, the supplemental brief argues, this Court should vacate Mr. Hill's conviction and dismiss the indictment.

11. Because of the obvious importance of the Johnson-based argument to Mr. Hill's appeal, I respectfully ask the Court to allow the filing of the supplemental brief. Although Johnson was decided on June 26th, counsel did not grasp the significance of that decision, which concerned a different statute, until several days ago.

12. I apologize to the Court for not having recognized the relevance of Johnson to Mr. Hill's appeal sooner.

13. Counsel's error, however, should not fall upon Mr. Hill. He is serving a 43-year prison sentence. He should have all of his potentially meritorious arguments considered by this Court.

14. I therefore respectfully ask the Court to allow the filing of the supplemental brief.

15. The Government, by Assistant United States Attorney Daniel Silver, does not oppose this motion. If the Court grants the motion and accepts appellant's supplemental brief for filing, the Government would like to have an opportunity to respond to the supplemental brief.

**WHEREFORE**, it is respectfully requested that this Court issue an order granting Mr. Hill leave to file the attached supplemental brief, which is being presented for filing herewith.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York  
November 10, 2015

/s/  
**YUANCHUNG LEE**

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**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Motion and Declaration has been served by CM/ECF electronic filing on the United States Attorney/E.D.N.Y.; Attention: **DANIEL SILVER, ESQ.**, Assistant United States Attorney, 271 Cadman Plaza East, Brooklyn, NY 11201.

Dated: New York, New York  
November 10, 2015

/s/  
**YUANCHUNG LEE**